

# QUAPAW TRIBE OF OKLAHOMA

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April 17, 2006

TO: U.S. Environmental Protection Agency, Region 6  
1445 Ross Avenue  
Dallas, Texas 75202-2733

FROM: Quapaw Tribe of Oklahoma (O-Gah-Pah)

RE: Comments on Drafts of Proposed "Administrative Settlement Agreement and Administrative Order on Consent for Remedial Design Treatability Studies" and "Statement of Work" dated March 29, 2006

*In re Tar Creek Superfund Site: ASARCO LLC, Blue Tee Corp., Childress Royalty Co., Doe Run Resources Corp., Gold Fields Mining, LLC, and NL Industries, Inc., Respondents, and U.S. Department of the Interior, Federal Respondent, CERCLA Docket No. 06-03-06*

Following are comments of the Quapaw Tribe of Oklahoma (O-Gah-Pah) on the drafts of the above-referenced documents, both of which relate to the Tar Creek OU4 ROD. The drafts of these documents were transmitted to counsel for the Quapaw Tribe on March 29, 2006, by James E. Costello, counsel in the Superfund Program office of U.S. Environmental Protection Agency Region 6. Mr. Costello's transmittal message requested comments by no later than March 31, 2006, although it was not possible for the Tribe to respond before that deadline. The following comments are being forwarded to Region 6 as quickly as possible.

## Statement of Work

As it has made very clear in other comments submitted to the EPA in the past, the Quapaw Tribe of Oklahoma opposes the proposed remedial alternative of capping chat bases and/or mill ponds. Capping these areas would severely limit their future use and would continue to expose Tribal members to health risks if they choose to use the land for cultural and/or subsistence purposes in the future. Consequently, the Tribe also opposes spending valuable resources designing and implementing treatability studies for the purpose of evaluating this alternative. The Tribe has made extremely clear to the EPA Region 6 on many occasions its position on this matter. Most of the contaminated lands within the Superfund Site are within the boundaries of the Quapaw Tribe's reservation, and they comprise trust and restricted lands that are within the Tribe's jurisdiction. Importantly, neither the Tribe's reservation, nor the trust and restricted land within its reservation, can ever be replaced. This is the Quapaw Tribe's only homeland. It is critical that the contaminated Indian lands be cleaned up and not simply fenced and forgotten. The stated objectives of cleaning-up the lands within the Quapaw Reservation to

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meet agricultural uses is not consistent with the Tribes future land use planning (which has been provided to the EPA previously) and may not be consistent with the actions defined in the ROD.

In general, treatability studies are used to evaluate the likelihood of success or failure of technologies that have passed a screening-level evaluation for conditions at a site. It has been shown at solid waste landfills that 1.5 feet of cover soil is inadequate in establishing sufficient root development for sustained vegetative cover. Moreover, there have been several capping and re-vegetation pilot projects conducted at other sites within the former Tri-State Mining district with less than favorable results. For example, it has been concluded that at sites in Missouri and Kansas where mine wastes have been covered with soil, and the soil has been amended with animal waste or other biomass fertilizer, it requires several amendments over several seasons to establish a self-perpetuating permanent vegetative cover. Regardless, the PRPs already should have adequate data from these projects regarding the treatability of covering or capping mine waste material.

Concerning the technical aspects of the proposed work, the documents should make clear that all studies must comply with EPA guidance documents, including but not limited to Data Quality Objectives ("DQOs"), Risk Assessment for Superfund ("RAGs"), and Data Usability for Risk Assessment. Also, the success/failure criteria must be specified prior to the investigations. This will enable for objective evaluation of the work.

In addition, the hydrogeological modeling exercise should occur prior to any other studies. Otherwise actions such as backfilling the mine workings could negatively impact the mine hydrology in a manner that cannot be easily reversed, if at all. Also, the EPA's target analyte list should be specified where analyses of "heavy metals" is described. Hydrogeologic modeling should focus of the fate and transport of heavy metals and other contaminants of concern—not of the transport of chat. In addition, a licensed hydrogeologist should be involved with the modeling design. The scope of the modeling effort laid-out in the SOW is overly broad and of little use (it also is outside the geographic scope of OU4). The Quapaw Tribe recommends a more focused modeling effort be performed prior to any discharges into the mine workings.

In summary, except for the hydrogeologic modeling, the Quapaw Tribe believes that all of the injection-related technologies proposed in the statement of work have been evaluated for *this* site to the degree that is necessary to implement these technologies post-ROD. The surficial covers/tilling technologies are not applicable to the remedy ultimately selected in the ROD. Moving forward by reinventing the wheel (once again) or evaluating technologies that are not under consideration could result in an irreversible and irretrievable commitment of recourses.

#### **Settlement Agreement and Administrative Order on Consent**

The Quapaw Tribe incorporates its comments concerning the draft statement of work, as they apply equally to the draft settlement agreement and administrative order on consent (the "AOC"). In general, it appears that the Quapaw Tribe's involvement has been reduced to a level

of involvement that is lower than that of the State of Oklahoma. For example the state is described as being involved in oversight activities, while the Tribe is not. Unlike the state, the Quapaw Tribe is not included in the definition of "Covered Response Costs" (part III(d)). However, the Quapaw Tribe is the government at greatest risk from all planned activities, and it plans to participate in all oversight work.

The Quapaw Tribe requests that references throughout the AOC to "state" be changed to "state and Quapaw Tribe." The Tribe requests that paragraph 61(a) contain a requirement that the respondents shall take actions pursuant to that paragraph, to the extent reasonably possible, in consultation with the Quapaw Tribe, through its Environmental Department Director. As to paragraphs 69 and 70, the Quapaw Tribe requests that it receive a copy of the referenced progress and other reports to be provided to the EPA Region 6. This will enable to the Tribe to have current information concerning the activities under the statement of work, and will enable to Tribe to provide more timely input on future proposed agreements.

Further, paragraph Nos. 82 through 84 should make clear that all actions must be taken pursuant to applicable Tribal law, as well as to applicable state and federal law. It is possible that Tribal law may control with respect to the trust and restricted lands that are within the Quapaw Tribe's reservation. The Quapaw Tribe wishes to be involved in all dispute resolution processes at the expense of the PRPs. Funding for this participation will require a recalculation/re-estimation of costs. The estimated cost of the treatability studies and the estimated costs of EPA oversight must be updated to reflect the concerns addressed in these comments.

Along these same lines, the Quapaw Tribe believes it should be compensated for such work, as well as any work associated with the dispute resolution process or any subsequent negotiations resulting from this agreement. Currently, though, the estimated costs for oversight do not appear to reflect any of these costs or the Tribe's involvement in these processes.

As to the comment process in general, footnote 1 is of concern to the Tribe for two basic reasons. First, comments on the respondents' proposals are considered "timely" if submitted within seven working days—for proposals under 10 pages in length—and within 14 working days—for proposals over 10 pages long. Almost all other time constraints placed on all other actions allow 14 working days for responses. The Tribe believes that 14 working days is more reasonable for this project. Second, the Tribe does not believe a comments deadline based upon the length of the proposal is reasonable. Also, no page limitation should be imposed on responses.

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The AOC should specify that all work performed in accordance with it must comply with the National Contingency Plan, as well as EPA's guidance on Data Quality Objectives ("DQOs"), Risk Assessment for Superfund ("RAGs"), and Data Usability for Risk Assessment. The Tribe also recommends that the PRPs expressly waive any challenges in this area.

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Concerning the definitions section of the AOC, the term "Transition Zone" is defined to

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mean the greater of (a) the land surface area that begins at the edges of a chat pile, chat base, or flotation pond, and that radiates outward in every direction from the edges of the chat pile, chat base, or flotation pond, and that ends where the concentration of lead, cadmium, and zinc in surface soil (surface soil means all soil from the surface to two feet below ground surface) *is below remediation goals established in the ROD*, or (b) the land surface area determined based on the formula described in paragraph 29 of the proposed statement of work. (Emphasis added.) *This definition differs from that used in the RI/FS as well as that used by practicing professionals. Pre-release baseline (or pre-mining background) is the criterion used to demarcate the beginning or the end of a given transition zone.* mice

Further, "chat" is defined to mean gravel-like mine or mill tailings (greater than 1/4 inch diameter) plus smaller intermingled material such as sands (sands means #20-65 mesh size or 0.033-0.008 inches in diameter) and fine tailings (fine tailings mean tailings less than 0.008 inches in diameter). These are not standard size classifications used by practicing professionals (sand is 2 mm to 0.062mm; the fines described above are fine sand, not clay and silt-sized). mice

As to Section IV, paragraph No. 15, the draft document does not accurately reflect the role of the Federal Respondent in the mining field. The last sentence of the paragraph should be revised to make clear that the Federal Respondent, pursuant not only to statute but to its trust responsibility to the members of the Quapaw Tribe, leased Indian mineral properties, provided supervision over and approval for mining activities on such properties, approved and supervised closings of the mineral leases and mining operations, and was responsible for approving and supervising the clean-up and restoration, if any, that occurred on such lands. As written, the draft makes it appear that the Federal Respondents merely "leased property on behalf" of the Quapaw owners, and this grossly minimizes the extent of the supervision and control provided by the Department of the Interior, the Bureau of Indian Affairs, and other federal entities with respect to these lands.

Similarly, paragraph 19—or one of the other paragraphs addressed to the mine tailings or "chat"—should make clear that the chat piles have, since no later than the World War I era, been managed by the Federal Respondents as a trust asset belonging to the Quapaw mineral owners, and that the individual interest owners have not had the ability to make decisions concerning the management and disposition of chat.

In the interest of efficiency, the Quapaw Tribe hereby incorporates by reference as to all of its comments on the referenced documents the comments opposing the capping remedy it previously has presented to the EPA Region 6. These include the detailed comments presented by the Tribe to the EPA's National Remedy Review Board in Dallas, Texas, on January 18, 2006. The Tribe further incorporates the comments it has provided to the EPA Region 6 making clear its position that the trust and restricted Indian lands within the Superfund Site and within the former mining district must be cleaned-up to a pre-mining background level. mice

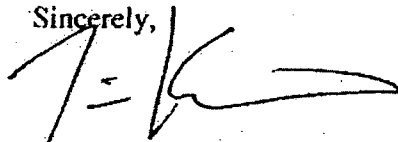
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You are welcome to contact me if you have any questions about the Quapaw Tribe's comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Kent', with a long horizontal stroke extending to the right.

Tim L. Kent, Director  
Environmental Department  
Quapaw Tribe of Oklahoma (O-Gah-Pah)

TLK/

cc: John L. Berrey, Chairman, Quapaw Tribe of Oklahoma  
Quapaw Tribal Business Committee  
Stephen R. Ward, General Counsel, Quapaw Tribe of Oklahoma